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No. 91-1101

In The

Supreme Court of the United States

October Term, 1991

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 76,

Petitioner,

v.

DAVE AND BEVERLY FOWLKES,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

RESPONDENTS' BRIEF IN OPPOSITION

JEROME F. MCCARTHY
Counsel for Respondent

1201 Pacific Avenue
Suite 1900
Tacoma, WA 98402
(206) 383-3791

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Dave and Beverly Fowlkes, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Supreme Court of the State of Washington's denial of review of the Washington State Court of Appeals' opinion in this case. The State Court of Appeals' opinion is reported at 58 Wn. App. 759, 795 P.2d 137 (1990). The notation of denial of Petitioner's petition for review by the Washington Supreme Court appears at 117 Wn. 2d 1019 (1991).

COUNTER-STATEMENT OF THE CASE

Respondent was a member of Petitioner, Local 76 ("Union"). He was dispatched through the Union's hiring hall in 1972 to Groff Electric, an employer signatory to a multi-employer collective bargaining agreement with the Union. He remained continuously employed as a journeyman electrician with Groff Electric for approximately eleven years. He was classified by the Union as a journeyman electrician for dues purposes.

At trial, Groff Electric's president testified that Fowlkes was a highly valued and respected journeyman electrician and that the company rated him as among the best of the many journeyman electricians dispatched to it through the Union's hiring hall during the years Fowlkes was employed with Groff Electric. Fowlkes was licensed as a journeyman electrician by the State of Washington. Despite having been dispatched through the Union hiring hall to Groff Electric, Fowlkes had never passed either a written or a practical journeyman electrician examination administered by a local union of the IBEW.

In 1982, work slowed with Groff Electric and most of its journeyman electricians were laid off. Fowlkes was not. His work week was, however, reduced, as was the work week of other journeyman electricians who remained in Groff's employ. While still employed with Groff, Fowlkes contacted the Union's hiring hall dispatcher and inquired as to the availability of work. The dispatcher told him that there was plenty of work available through the hall, that he should come on in, register on the out of work list and be dispatched. He resigned from employment with Groff and did as advised. He

registered on the highest priority list, Book I, without Union objection and was quickly dispatched to a short duration job.

When that job ended, he returned to the hall and once again registered on the highest priority list. Later, he was contacted by the Union dispatcher and informed that he was not eligible for registration on the highest referral list because he had not passed a journeyman's test administered by a local union of the IBEW. There followed attempts by Fowlkes to resolve the matter internally within the local and international union, to no avail. Ultimately, Fowlkes was told by the Union's dispatcher that he was not Book I, he was not Book II, he was not Book III or IV, that he was nothing. There is no dispute that Fowlkes met all criteria for registration on Book I, except the journeyman examination requirement.

A category of electrician within the Union denominated Class "D" wireman, numbering at least 20 to 25 union members, had been certified by Local 76 as journeyman electricians based solely upon four years or more of successful employment with a signatory employer as a journeyman electrician, without having taken any test at all. Class "D" wireman does not signify any special competence. It is a term applied to members who were dispatched through the Union's hiring hall at a time when referral lists were exhausted. Fowlkes was denied that certification despite his approximately eleven years of continuous service as a journeyman electrician with Groff Electric and was refused a practical exam.

Local 76 administered only one type of exam, a written exam, although the collective bargaining agreement

authorized it to administer a practical as well as a written exam. The Union, at trial, claimed it administered only written exams despite the fact that it had accepted four years of successful employment for Class "D" wireman as sufficient evidence of proficiency to warrant certification as a journeyman. The one other avenue available to applicants for certification as a journeyman electrician, completion of the Union's apprenticeship program, was not available to Fowlkes because, at the time the dispute arose, he was approximately 50 years of age and thus ineligible for enrollment in the apprenticeship program.

After attempting for more then six months to resolve this dispute within the Union and by enlisting the aid of the international union, Fowlkes withdrew from membership in the local union (but continued his international union membership) and sought work as a journeyman electrician outside the Union context. (The Union's bylaws prohibit a member from soliciting work outside the hiring hall and subject a member to penalty for doing so.) Fowlkes quickly found work as a journeyman electrician with an electrical construction company which had formerly been a union contractor. He was still employed with that employer at the time of trial. That company's president testified at trial that he employed Fowlkes on all phases of electrical construction and found him to be a very capable, proficient and well qualified journeyman electrician, who he quickly promoted to foreman.

Based upon the evidence adduced at trial, *i.e.*, that Fowlkes was a competent journeyman electrician; that others (Class D wireman) were certified as journeyman wireman without having taken Local 76's written examination or having completed the apprenticeship program;

and evidence that the written examination administered and required by the Local "had little or no application to journeyman electrician work in the trade," the jury concluded that the Union's insistence upon a written exam as the only method for demonstration of competence was arbitrary and awarded damages.

On appeal, the court correctly observed that this was a duty of fair representation case arising out of the Union's refusal to dispatch Fowlkes through its hiring hall; that the matter was governed by federal law; and applying federal law, that there was sufficient evidence to support the claim that the Union engaged in an arbitrary and discriminatory hiring hall practice.

REASON WHY THE PETITION SHOULD BE DENIED

I. The Petition Should Be Denied Because The State Court Decision Neither Threatens The Enforceability Of Labor Agreements Nor Is In Disregard Of Governing Supreme Court Authority.

A. The Court Below Neither Decided That the Union Breached Its Duty Of Fair Representation By Negotiating Or Accepting A Collective Bargaining Agreement Nor Substituted The Court's Own View Of The Proper Bargain And Therefore The Case Is Not Governed By *Airline Pilots v. O'Neill*, 499 U.S. ___, 113 L.Ed. 2d 51 (1991).

Fowlkes satisfied all criteria for referral from the highest priority hiring list which had been required of other members. There was nothing in the collective bargaining agreement which required that Fowlkes be denied the right to register on the highest priority list.

The Union's administration and implementation of that collective bargaining agreement, specifically its insistence upon a written examination which included materials irrelevant to the performance of job duties, and its refusal to offer practical exams authorized by the collective bargaining agreement, posed the barrier to Fowlkes' registration. The Union's approach is particularly inexplicable in view of the record evidence that it had certified others, at least 20 to 25, who had demonstrated their qualifications in the same manner as Fowlkes had, *i.e.*, successful employment in the trade over a period of years. The Union's claim that it was simply following the dictates of the collective bargaining agreement by insisting on a written exam is belied by the collective bargaining agreement itself.

The parties to the agreement contemplated two methods of certification, not just the one insisted upon by the Union. Obviously, this was done in contemplation of the fact that many competent journeyman electricians employed for many years in the field have established their skill by performance.

Nothing in the court's decision below impacts the Union's authority to negotiate collective bargaining agreements. It is not the fact that the collective bargaining agreement required a demonstration competence that gave rise to this suit, it is the manner in which the Union chose to implement that agreement, *i.e.*, by denying a practical examination, administering only a written examination to Fowlkes which had little relationship to the job requirements of a journeyman electrician, while accepting experience as a qualifying criteria for a substantial number of others.

The Union's bargaining authority is not nullified by the decision below, indeed it is not implicated.

The petitioner cites *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) and *Airline Pilots v. O'Neill*, 499 U.S. ___, 113 L.Ed. 2d 51 (1991) in support of its petition. Each involved duty of fair representation claims challenging agreements negotiated by the union which adversely affected the interests of certain members of the bargaining unit. This is not a contract negotiations case, it is a hiring hall case, and involves a claim solely against the Union for what Respondent contends, and what the court below found, was arbitrary and capricious conduct by the Union. Those rights are secured to him under the terms of the collective bargaining agreement, under the Union's bylaws and by federal law. *Breininger v. Sheet Metal Workers Local 6*, 110 S.Ct. 424 (1989).

B. The State Court Determined That The Union Breached Its Duty Of Fair Representation.

The State Court reviewed the evidence, holding that even if it were to review the Union's assignment of error involving the sufficiency of the evidence, it was satisfied that the evidence was sufficient to establish that the Union engaged in an arbitrary and discriminatory hiring hall practice. Moreover, this is not an issue of sufficient importance to warrant review.

II. The State Court Appropriately Applied The Federal Limitations Period For Non-Hybrid Duty Of Fair Representation Suits Because Fowlkes Made No Breach Of Contract Claim Against An Employer.

The court's decision does not conflict with *DelCostello v. Teamsters*, 462 U.S. 151 (1983) or the court's later decision, *Reed v. United Transportation Union*, 109 S.Ct. 621 (1989). The court's decision below is correct on two grounds. First, this is not a hybrid duty of fair representation – breach of contract claim. It is a suit solely against the union for breach of its duty of fair representation arising out of its administration of its hiring hall. There is no breach of contract claim against any employer and no basis for one. As the court below correctly observed, *DelCostello* was a hybrid breach of contract duty of fair representation claim. Because of the federal policy requiring speedy resolution of disputes which have the potential for burdening and obstructing commerce, the court in *DelCostello* applied a six month limitations period. As the court below observed, it was not until 1985 that the federal courts expanded *DelCostello* to include non-hybrid duty of fair representation claims, such as hiring hall claims. The court below, applying federal policy, determined that the six month statute should not be applied retroactively.

Second, in a recent case, this Court concluded that federal policy requiring speedy resolution of breach of contract claims did not apply with sufficient force in purely internal union disputes such as this, and that the most closely analogous state statute applies. *Reed v. United Transportation Union*, 109 S.Ct. 621 (1989).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted this 31st day of January, 1992.

JEROME F. MCCARTHY
Attorney for Respondents